SPECIAL REPORT: OSHA'S PROPOSED RULEMAKING ON INDOOR AIR QUALITY AND INDOOR SMOKING

OSHA Announces Proposed IAQ/ETS Rulemaking

The Department of Labor announced on Friday, March 25, 1994, that OSHA has decided to initiate a combined rulemaking on indoor air quality and indoor smoking. The proposed rule, which would apply to some six million workplaces including bars and restaurants, would require employers in every industrial and nonindustrial worksite in the United States to ban smoking indoors or restrict smoking to a separate room with outside exhaust and negative pressure.[1] In addition, no employee could be compelled to enter a

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1. The indoor smoking provisions of the proposed rule provide as follows:

   Tobacco smoke.

   (i) In workplaces where the smoking of tobacco products is not prohibited, the employer shall establish designated smoking areas and permit smoking only in such areas;

   (ii) The employer shall assure that designated smoking areas are enclosed and exhausted directly to the outside, and are maintained under negative pressure (with respect to surrounding spaces) sufficient to contain tobacco smoke within the designated area;

   (iii) The employer shall assure that cleaning and maintenance work in designated smoking areas is conducted only when no smoking is taking place;

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designated smoking room in the performance of normal work activities. The proposed rule would address IAQ problems in nonindustrial worksites by (i) requiring the implementation of IAQ compliance plans that would ensure the proper operation and maintenance of ventilation systems in order to control indoor air contaminants, (ii) establishing IAQ procedures during renovation and remodeling, (iii) requiring the implementation of measures relating to indoor air contaminants, (iv) requiring employee information and training, and (v) requiring an employee complaint procedure. OSHA maintains that the proposed rule "would not require all building owners to install new ventilation systems."

The public has been invited to comment on the proposed standard. The comments must be postmarked within 90 days from the date the proposed standard is published in the Federal Register; publication is expected to occur during the week of April 4. Informal public

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(iv) The employer shall assure that employees are not required to enter designated smoking areas in the performance of normal work activities;

(v) The employer shall post signs clearly indicating areas that are designated smoking areas; and

(vi) The employer shall post sign that will clearly inform anyone entering the workplace that smoking is restricted to designated areas.

(vii) The employer shall prohibit smoking within designated smoking areas during any period that the exhaust ventilation system servicing that areas if not properly operating.

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hearings on the proposed standard are currently scheduled for July 12 through 26, 1994. Those who intend to appear at the hearings must send a notice to OSHA; the postmark deadline for such notices is 75 days from the date of publication. (More information about submitting comments and appearance notices can be found below.) According to the Assistant Secretary of Labor, a final rule may be years away.

The rulemaking was announced during a press briefing conducted by Robert Reich, the U.S. Secretary of Labor, and Joseph Dear, Assistant Secretary of Labor in charge of OSHA. "The decision to propose a strong set of standards to remedy this hazard was not taken lightly," according to Reich. "Soon after this administration arrived in Washington, we commenced an analysis of all of the research to date linking poor air quality at the workplace to serious illnesses and deaths among American workers, including heart disease, upper respiratory illnesses and disease, and cancer. After many months of analysis, it is clear that there is sufficient evidence to commence this rulemaking proceeding." Noting that his own Department does not comply with the proposed rule, Reich said he would require the Department of Labor to begin immediately to develop a plan to provide "all employees with a smoke-free workplace in all Department facilities in accordance with our proposal."

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Dear claimed that the proposed rulemaking "will protect America's working men and women from heart disease, lung cancer, pulmonary tract infections, and countless other diseases and illnesses all linked to poor indoor air quality and environmental tobacco smoke." In response to questions, Dear stated that the rule would be "self-enforcing" with respect to ETS. "Twenty-five percent of the nation's employers already have restriction on smoking," he said. "There are a lot of public facilities where smoking is already restricted. And it seems to work without any outside enforcement activity."

Mixed-Use or Multi-Employer Buildings

When asked whether the smoking restrictions would apply to mixed-use buildings, Dear said OSHA only had jurisdiction over employers and workplaces, implying that residential areas in buildings housing offices would not be affected. With respect to all multi-employer worksites, OSHA maintains that it has a long history of enforcing OSHA standards in them. See Anning-Johnson (4 OSH Cas. (BNA) 1193; Harvey Workover, Inc., 7 OSH Cas. (BNA) 1687; OSHA Field Operations Manual (CL 2.45 CH-1, Chapter V-9). As a general matter OSHA regards each employer as being responsible for the health and safety of his or her own employees. However, under certain circumstances an employer may be cited for endangering the safety or health of another employer's employees. In determining

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who to hold responsible, OSHA states that it will look at who created the hazard, who controlled the hazard, and whether all reasonable means were taken to deal with the hazard. It is contemplated by OSHA that in those cases where there is a multi-employer worksite covered by the proposed rule, the affected employers will divide up the responsibilities in the manner in which they make the most sense. Those who have information at their disposal that is required to be kept under the proposal will make use of the information or make it available to whoever will need that information in the discharge of their duties.

Restaurants, Bars and Hotels

As currently drafted, the proposed rulemaking would make no exemption for restaurants and bars. OSHA's proposed rule purports (i) to treat restaurants and bars as workplaces covered by the proposed rule, (ii) to require separate, enclosed smoking areas for all restaurants and bars covered by the proposed rule, and (iii) to prohibit employers from compelling employees (such as waiters and waitresses) from entering the smoking areas as a part of their regular employment. In this regard, Dear said, "The intention is to protect workers from the health effects of poor indoor air and environmental tobacco smoke. The requirement is, with respect to smoking, that if it is permitted it has to be in a separate room with negative pressure that's exhausted to the outside. That

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requirement means that employees could not be compelled to work to serve in those rooms." When asked if this would amount to a "flat ban on smoking in restaurants," Dear replied, "As the rule is proposed, that would be the effect."

Hotels also would be covered by the proposed rule. Dear stated in the press conference that smoking could not occur in hotel rooms when hotel employees were present. There was no clarification as to whether OSHA would require "smoking hotel rooms" to be separately exhausted.

General Application

Fielding a question regarding the purported seriousness of the threat posed by ETS in light of the EPA Risk Assessment on ETS, Reich said, "We based the decision to move forward with a rule on many studies including the EPA study to which you referred. . . . The studies convinced us, convinced me, convinced the assistant secretary, that we had very strong reason to believe that the health risks substantially outweighed whatever burden might be imposed upon American business."

When Dear was asked to predict what the reaction to the proposed rule would be, he referred to the Request for Information on indoor air quality made by OSHA in 1991. With more than 1,200 comments in

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the record, Dear said, "those comments span the gamut from opposition to this action to full support."

Solicitor of Labor Tom Williams stressed during the press conference that the proposed rule may be changed in response to public comments they receive. They did not rule out the possibility that some worksites, such as restaurants and bars, may ultimately be exempted.

According to Dear, the costs associated with implementing the proposal include a one-time first year cost of $1.5 billion in addition to $6.6 billion in expenditures on an annual basis. OSHA has estimated that the measure would result annually in $15 billion in benefits to American business. Reich observed that the benefits will come from an increase in worker productivity. Reich also noted that the proposal was cleared after a preliminary cost analysis by the Office of Management and Budget.

The development of a second proposed rule and a second round of public hearings has been included in OSHA's schedule should revision of the rule become necessary in light of the comments received, Dear said. He estimated that after the period of public commentary a second proposal could be released late in 1994 or early in 1995. When pressed to predict the earliest that the rule as finalized would be effective, Dear suggested that it would be "a

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couple of years." Following the publication in the Federal Register of a final rule, affected parties can obtain judicial review in the U.S. Court of Appeals.

Hearings and Public Participation

Interested persons are requested **BY OSHA** to submit written data, views and arguments concerning the proposed rule. Responses to the questions raised at various places in the proposal are particularly encouraged. As indicated above, these comments must be postmarked 90 days after publication of this proposal in the Federal Register. Comments are to be submitted in quadruplicate, to: The Docket Office, Docket No. H-122, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone No. (202) 219-7894.

All written comments received within the specified comment period will be made a part of the record and will be available for public inspection and copying at OSHA Docket Office.

A. Notice of Intention to Appear at the Informal Hearing

Pursuant to section 6(b)(3) of the OSH Act, informal public hearings will be held on this proposal in Washington, D.C. from July 12 through July 26, 1994. If OSHA receives sufficient

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requests to participate in the hearing, the hearing period may be extended.

The hearing will commence at 9:30 a.m. in the auditorium of the Frances Perkins Building, U.S. Department of Labor, 3rd Street and Constitution Avenue, N.W., Washington, D.C. 20210.

Persons desiring to participate at the informal public hearing must file a notice of intention to appear by 75 days after date of publication in the Federal Register. The notice of intention to appear must contain the following information.

1. The name, address, and telephone number of each person to appear;
2. The capacity in which the person will appear;
3. The approximate amount of time required for the presentation;
4. The issues that will be addressed;
5. A brief statement of the position that will be taken with respect to each issue, and
6. Whether the party intends to submit documentary evidence and, if so, a brief summary of it.

The notice of intention to appear must be mailed to Mr. Thomas Hall, OSHA Division of Consumer Affairs, Docket No. H-122, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue, N.W.,

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Washington, D.C. 20210, Telephone No. (202) 219-8615. A notice of intention to appear also may be transmitted by facsimile to (202) 219-5986, by the same date provided the original and 3 copies are sent to the same address and postmarked no later than 3 days later.

B. Filing of Testimony and Evidence Before the Hearing

Any party requesting more than ten (10) minutes for presentation at the informal public hearing, or who intends to submit documentary evidence, must provide in quadruplicate the testimony and evidence to be presented at the informal public hearing. One copy shall not be stapled or bound and be suitable for copying. These materials must be provided to Mr. Thomas Hall, OSHA Division of Consumer Affairs, at the address above and be postmarked no later than 90 days after date of publication in the Federal Register.

Each submission will be reviewed in light of the amount of time requested in the notice of intention to appear. In instances where the information contained in the submission does not justify the amount of time requested, a more appropriate amount of time will be allocated and the participant will be notified of that fact prior to the informal public hearing.

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Any party who has not substantially complied with the above requirement may be limited to a 10-minute presentation and may be requested to return for questioning at a later time.

Any party who has not filed a notice of intention to appear may be allowed to testify for no more than 10 minutes as time permits, at the discretion of the Administrative Law Judge, but will not be allowed to question witnesses.

Notice of intention to appear, testimony and evidence will be available for inspection and copying at the Docket Office at the address above.

C. Conduct and Nature of Hearing

The hearing will commence at 9:30 a.m. on the first scheduled day. At that time, any procedural matters relating to the proceeding will be resolved.

The nature of an informal rulemaking hearing is established in the legislative history of section 6 of the OSH Act and is reflected by OSHA's rules of procedure for hearings (29 CFR 1911.15(a)). Although the presiding officer is an Administrative Law Judge and questioning by interested persons is allowed on issues, the proceeding is informal and legislative in type. OSHA's intent,

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presumably, is to provide interested persons with an opportunity to make oral presentations which can proceed expeditiously in the absence of procedural restraints which impede or protract the rulemaking process.

Additionally, since the hearing is primarily for information gathering and clarification, it is an informational administrative proceeding rather than an adjudicative one. The rules of evidence will not apply. The regulations that govern hearings are designed to try to ensure fairness and due process and also facilitate the development of a clear, accurate and complete record. Thus, question of relevance, procedure and participation typically are decided so as to favor development of the record.

The hearing will be conducted in accordance with 29 CFR Part 1911. It should be noted that §1911.4 specifies that the Assistant Secretary may upon reasonable notice issue alternatives procedures to expedite proceedings or for other good cause. The hearing will be presided over by an Administrative Law Judge who makes no decision or recommendation on the merits of OSHA's proposed rule. The responsibility of the Administrative Law Judge is the ensure that the hearing proceeds at a reasonable pace and in an orderly manner. The Administrative Law Judge, therefore, should have all the powers necessary and appropriate to conduct a full and fair

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informal hearing as provided in 29 CFR Part 1911 including the powers:

1. To regulate the course of the proceedings;
2. To dispose of procedural requests, objections and comparable matters;
3. To confine the presentations to the matters pertinent to the issues raised;
4. To regulate the conduct of those present at the hearing by appropriate means;
5. In the Judge's discretion, to question and permit the questioning of any witness and to limit the time for questioning; and
6. In the Judge's discretion, to keep the record open for a reasonable, stated time (known as the post-hearing comment period) to receive written information and additional data, views and arguments from any person who has participated in the oral proceedings.

If OSHA subsequently issues a revised rule, there may be an additional, second round of hearings.

The States

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OSHA maintains that Section 18 of the Occupational Safety and Health Act (OSH Act) expresses Congress' intent to preempt state laws relating to issues on which Federal OSHA has promulgated occupational safety and health standards. Under the OSH Act, a state can avoid preemption if it submits, and obtains Federal approval of, a plan for the development of such standards and their enforcement. Therefore states with occupational safety and health plans approved under Section 18 of the OSHA Act will be able, according to OSHA, to develop their own state standards to deal with any special problems which might be encountered in a particular state.

The proposed Federal standard on indoor air quality addresses hazards which are not unique to any one state or region of the country. OSHA has stated that it recognizes that many state and local governments have enacted provisions addressing indoor air quality issues including the presence of ETS. Section 18(a) of the OSH Act requires preemption only of state laws that qualify as occupational safety and health standards, not of state laws of general applicability. It is OSHA's intent that state laws consistent with this standard remain in effect to the maximum extent permitted.

As to the 25 states and territories with their own OSHA-approved occupational safety and health plans, OSHA asserts that all such

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states must adopt a comparable standard within six months of the publication date of a final standard. These 25 states are: Alaska, Arizona, California, Connecticut (for public employees only), New York (for state and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Until such time as a state standard is promulgated, in these 25 states, Federal OSHA apparently will provide interim enforcement assistance, as appropriate, in these states.

Other Aspects of the Proposed Rule

- Assistant Secretary Dear confirmed that OSHA intends the proposed rule to cover small employers (with as few as several employees), although he indicated that self-employed individuals are not covered.

- OSHA states that a finding of significant risk is supported by data submitted to the record "and other evidence," but it is not immediately clear what the other evidence is.

- The relevant health effects produced by poor indoor air quality are, according to OSHA: irritation, pulmonary,

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cancer, reproductive, cardiovascular and various system. OSHA also discusses all six disease endpoints as health effects attributable to nonsmoker exposure to ETS, although cardiovascular effects and lung cancer receive the most discussion.

- OSHA states that it concludes "that the relative risk of lung cancer in nonsmokers due to chronic exposure to ETS ranges between 1-20 and 1.50 and the relative risk for heart disease due to ETS exposure ranges between 1-24 and 3.00." OSHA also concludes that it is not limited to an examination of workplace data, and states that the "health effects observed and the risk estimates calculated from studies of the general population, or of selected subgroups, such as nonsmoking wives of smoking husbands, are relevant to the working nonsmoking population."

Reaction to OSHA's Proposal

ASH responded to the OSHA announcement by circulating a press release in which it asserts that OSHA's action is directly attributable to ASH's pending lawsuit against OSHA seeking to force the initiation of a separate rulemaking on ETS. ASH claims that the workplace smoking policy "was developed to meet a court deadline that [OSHA] file a brief by Friday, March 18th,

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demonstrating that it did not unreasonably delay in acting on the issue of workplace smoking." A discussion of the brief filed by OSHA appears later in this Report.

According to ASH "it is very pleased with OSHA's action, and believes that its law suit has been largely successful." ASH notes, however, that the law suit will not be dismissed. John Banzhaf, executive director of ASH, claims that he will use the law suit to press OSHA to move more quickly on the rulemaking and to seek a complete ban on smoking in the workplace. Banzhaf claims, "Scientific studies show that smoking even in separately-ventilated rooms poses a health risk to workers from the amount of smoke which nevertheless escapes which is higher than allowed with other chemicals."

Jim Dinegar, spokesperson for the Building Owners and Managers Association (BOMA) International, reportedly approved the OSHA proposal on smoking, but plans to take issue with any building maintenance practices that will cost the industry billions of dollars each year. BOMA has consistently taken an approach to IAQ issues that would involve controlling the sources of indoor air contaminants. Association members are, according to Dinegar, "reeling from the economy right now, and $8 billion is a lot of money." BOMA president Thomas McChesney reportedly complained that "OSHA's regulatory proposal misses the mark by not going far enough

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to eliminate the origin of IAQ problems but, rather, goes to excessive lengths in proposing record keeping requirements."

According to a press report, the American College of Occupational and Environmental Medicine has also endorsed OSHA's proposed workplace smoking policy. A representative of that organization was quoted as saying, "Our physician members witness how environmental tobacco smoke (ETS) destroys people's lives and welcome the government's aggressive move to improve worker health." Scott Ballin of the American Heart Association reportedly said the organization is "very pleased that the Labor Department and OSHA have taken this initiative. It's clearly a major step."

Speaking against the proposal, Brennan Dawson of The Tobacco Institute (TI) was quoted in a press report as saying, "This is social engineering on a vast scale. Such massive intervention into the private lives of adults recalls the extremism of Prohibition." Dawson also said, "In order to regulate any substance, OSHA has an obligation to demonstrate a significant risk or hazard, and that has not been done with environmental tobacco smoke." TI's Thomas Lauria was quoted as saying, "OSHA cannot restrict smoking or any other substance without proof of harm that is derived from workplace studies."

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Also criticizing the proposal was Wendy Webster of the National Restaurant Association, who reportedly said that most of the organization's 550,000 members believe that decisions about smoking policies in bars and restaurants should be made by individual owners and their clientele. The senior director of the association said that many restaurant owners have blamed smoking bans for reducing income.

"Regulatory Text" Published in Support of Rulemaking

Some 300 pages of material preceding the actual proposed rule will appear in the Federal Register notice. In this material, OSHA reviews the comments received in response to its request for information on indoor air. OSHA cites the ETS risk assessment as providing support for its determination that ETS in the workplace must be regulated and states that it has submitted its proposed standard to the EPA for review and comment.

As indicated above, OSHA specifically lists the following health effects as a result of ETS exposure: (i) eye and upper respiratory tract irritation; (ii) decreases in pulmonary function and the risk of developing COPD; (iii) cardiovascular effects including acute effects, such as exacerbation of angina, and chronic effects, such as atherosclerosis; (iv) reproductive effects, including low birth weight, miscarriage, and congenital abnormalities; and (v) cancer.

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OSHA finds that heart disease and lung cancer "constitute the type of 'material impairment of health or functional capacity' which the Act seeks to reduce or eliminate." The agency estimates that "there will be approximately between 144 and 722 cases of lung cancer per year among nonsmoking American workers exposed to ETS in the workplace." The agency further estimates that "there will be between 2,094 and 13,000 deaths from heart disease per year among nonsmoking American workers exposed to ETS in the workplace."

The agency justifies not regulating ETS under its guidelines for the regulation of potential occupational carcinogens ("Cancer Policy") by claiming that the guideline procedures "may not allow for the level of public input and policy review that is appropriate for this rulemaking, involving many different types of health effects and a broad range of employers and workers."

OSHA cites a study conducted in 1987-88 in California called the "California Activity Pattern Study" to conclude that "the workplace is the location with the highest reported exposure to ETS in enclosed environments, and such exposure is on average nearly three times more prevalent at work than at home." OSHA also concludes that there is a sufficient database to support findings about concentrations of ETS in workplaces, and states, "Air exchange rates in nonindustrial workplaces are not designed to control the risks of ETS exposure."

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In its preliminary risk assessment of ETS, OSHA has determined that "health effects observed and the risk estimates calculated from studies of the general population, or of selected subgroups, such as nonsmoking wives of smoking husbands, are relevant to the working nonsmoking population." Based on a number of epidemiological studies which OSHA finds to be reliable, OSHA concludes that "for every 1,000 workers exposed to ETS at their workplace in the course of a 45-year working lifetime" "approximately 1 will most likely develop lung cancer and 7 to 16 will develop heart disease."

OSHA admits that data related to poor IAQ and health effects is not well developed, but estimates that "the lifetime excess burden for severe headaches experienced in air-conditioned office buildings is 57 per one thousand exposed employees and the lifetime risk for acute upper respiratory conditions is 85 per one thousand exposed employees." OSHA requests comment to provide more data about the health effects of poor IAQ and about specific levels of contaminants found indoors.

IAQ/ETS Issues Addressed by OSHA Since 1985

On at least five occasions prior to the announcement of a specific IAQ/ETS rulemaking, OSHA had denied requests by individuals and organizations to regulate smoking in the workplace. As recently as

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January 1992, former OSHA officials were quoted as saying that "research linking workplace environmental tobacco smoke to lung cancer and other health concerns is particularly lacking and would have to be addressed more thoroughly before the agency could support a more aggressive regulatory approach." ASH alone has filed four actions in court against OSHA challenging adverse agency decisions about ETS in the workplace. ASH's requests for relief have been denied three times; the fourth case is pending as of this writing.

The following chronology of events summarizes the involvement of OSHA with ETS and IAQ issues during the past decade.

1985 -- Petition filed by Senator Garn for Mr. David Horne, et al., with OSHA requesting a classification of tobacco smoke as a Category One Potential Occupational Carcinogen. OSHA denies petition.

1986 -- Petition filed by Congressman David Monson for Mr. David Horne with OSHA requesting an emergency temporary standard governing ETS in the workplace.

1987 -- OSHA denies Monson petition. Public Citizen Health Research Group and the American Public Health Association petition OSHA for an emergency temporary standard to restrict smoking in

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workplaces to certain specified areas. OSHA denies the petition. ASH petitions OSHA for an emergency temporary standard to ban smoking in common workplace areas.

1988 -- OSHA requests an independent contractor to review the evidence on ETS exposure submitted by above petitioners. The evidence is criticized as being based primarily on residential exposure.

1989 -- ASH files complaint in U.S. District Court seeking an order to compel agency action on its 1987 petition. OSHA denies petition for emergency temporary standard. ASH dismisses its complaint and files a petition for review of OSHA's determination not to issue an emergency temporary standard with the court of appeals.

1990 -- ASH and OSHA agree to hold proceedings in abeyance until OSHA considers whether to take action on ETS. In November, OSHA states it is awaiting final EPA Risk Assessment on ETS. In December, OSHA declares its intent to issue a request for information on indoor air, including ETS, in the Spring of 1991.

1991 -- ASH files two new petitions for review with the court of appeals. In May, court denies ASH's first petition to review OSHA's refusal to issue an emergency temporary standard. In

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September, OSHA issues its request for information on indoor air, including ETS.

1992 -- AFL-CIO and other unions petition OSHA to develop an IAQ standard based on a "building systems" approach. Court denies second and third ASH petitions. In February, March and July, ASH files rulemaking petitions with OSHA seeking regulation of workplace smoking. In addition, ASH files in July a petition requesting that OSHA initiate a rulemaking under its Cancer Policy to ban smoking in all indoor workplaces or restrict smoking to separate areas with independent ventilation. In October, OSHA responds to this petition stating it is reviewing materials from request for information and does not believe a separate rulemaking is necessary. In December, ASH files petition for review with court of appeals, seeking review of October letter.

1993 -- EPA issues its final Risk Assessment on ETS, and outgoing Secretary of Labor Lynn Martin issues memorandum to OSHA requesting the agency to commence rulemaking for ETS separate from IAQ "as soon as possible." In May, court denies OSHA's motion to dismiss.

1994 -- ASH and OSHA file briefs with court of appeals. Oral argument is scheduled for May 16. On March 25, OSHA announces proposed rulemaking on IAQ and smoking in the workplace.

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Some of the information for this discussion came from UPI and PR Newswire, March 25, 1994; The Guardian, Los Angeles Times and Newsday, March 26, 1994; BNA's Occupational Safety and Health Reporter, Special Report on OSHA, January 8, 1992.

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